

No. 83-594

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

JANET E. PITTS, Administratrix, etc.,
Petitioner,

vs.

UNARCO INDUSTRIES, INC., et al.,
Respondents.

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition for Writ of Certiorari should be denied because Petitioner has failed to present any special or important reasons for granting such review in light of the facts that (1) the decision of the Seventh Circuit of which review is sought is not only consistent with, but compelled by, prior decisions of this Court rejecting due process and equal protection challenges, such as Petitioner here makes, to a State statute of limitations, or other rule of tort law, which rationally achieves legitimate State interests, as does Indiana's here, and (2) this Court has previously dismissed appeals in which a plaintiff-appellant contended, as does Petitioner here, that the barring of his or her State claim for compensation for an alleged asbestos-related disease by a State statute of limitations violated federal due process and equal protection guarantees.

LIST OF PARTIES

Pursuant to Supreme Court Rule 28.1 Respondents state that the parties to this proceeding are:

Janet E. Pitts, Administratrix, etc.,

Petitioner,

vs.

Unarco Industries, Inc.,
GAF Corporation,
Armstrong World Industries, Inc.,
Rock Wool Corporation,
Nicolet, Inc., and
Forty-Eight Insulations, Inc.

Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals [Petition for a Writ of Certiorari ("Petition"), Appendix pp. A1-A9] is reported at 712 F.2d 276 (1983). The Opinion and Order of the District Court (Petition, pp. A10-A17) is not reported.

JURISDICTION

Respondents adopt the jurisdictional statement of Petitioner (Petition, p. 1).

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is argumentative and generally unsupported by the Record, especially the third through sixth paragraphs. Therefore, Respondents respectfully offer the following proper Statement of the Case.

On December 14, 1981, approximately 20 months following the death of her husband, Janet E. Pitts, individually and as Administratrix of the Estate of Donald E. Pitts, deceased, filed a five-count Complaint against Respondents. The Complaint alleged that Petitioner's husband died from exposure to asbestos-containing products, distributed in Indiana by Respondents, during his approximately 30-year career as an asbestos insulation mechanic. Jurisdiction was based upon diversity of citizenship and liability was alleged upon the following theories: Count I—negligence; Count II—strict liability; Count III—breach of implied warranties of merchantability and fitness; Count IV—conspiracy to withhold asbestos-related health risks from the public; Count V—loss of consortium. The Complaint prayed for compensatory and punitive damages.

Counts III, IV, V and the prayer for punitive damages were disposed of at the trial court level through abandonment by Petitioner and various pre-trial rulings. Respondents moved for Summary Judgment on Counts I and II based on the ten-year Indiana products liability statute of limitations contained in IC 33-1-1.5-5. After lengthy arguments, stipulations and submissions of evidence in open court, during which time Petitioner was afforded ample opportunity and did present arguments and evidence in opposition, the Respondents' Motions were granted.

The granting of the Motions was based upon the Trial Court's finding that Donald E. Pitts was not exposed to any asbestos-containing products delivered by Respondents to an initial consumer or user within the ten years prior to the filing of Petitioner's Complaint. (Petition, pp. A16-A17).

Subsequently, the ruling of the Trial Court was affirmed by the United States Court of Appeals for the Seventh Circuit in its decision dated July 11, 1983. (Petition, pp. A1-A9).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because it presents no special or important reasons for review by this Court. The decision of the Seventh Circuit is not only consistent with, but is compelled by, prior decisions of this Court rejecting due process and equal protection challenges, such as Petitioner here makes, to a State statute of limitations, or other rule of tort law, which rationally achieves legitimate State interests, as does Indiana's here.

Moreover, this Court has previously dismissed appeals in which a plaintiff-appellant contended, as does Petitioner here, that the barring of his or her State claim for compensation for an alleged asbestos-related disease by a State statute of limitations violated federal due process and equal protection guarantees.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO PRESENT ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING SUCH REVIEW.

Rule 17.1 of this Court (28 U.S.C.A.: Rules, 1983 Pocket Part) provides as follows:

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted *only* when there are *special* and *important* reasons therefor." (Emphasis supplied).

Petitioner clearly fails to meet this test because she has not presented any special or important reasons for this Court's review of the decision of the United States Court of Appeals for the Seventh Circuit of July 11, 1983, styled *Pitts v. Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983) (Petition, pp. A1-A9).

In Rule 17.1, this Court set forth three types of situations in which "the character of reasons" presented by the Petition may be considered to be sufficiently "special and important" to justify review. Petitioner fails to indicate which of the three types of reasons she contends justify review. Her failure to do so is clearly not inadvertent. She simply cannot do so. Certiorari should therefore be denied.

Petitioner cites no decision of a federal court of appeals which she claims is in conflict with the Seventh Circuit's *Pitts* decision. Nor can she cite any decision of the Indiana Supreme Court which she claims to be in conflict with *Pitts*. Nowhere in the Petition is there any suggestion that the Seventh Circuit "has so far departed from the

accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). Petitioner thus fails to meet the tests outlined in Rule 17.1(a).

Petitioner also fails to bring her Petition within subparagraph (b) of Rule 17.1 inasmuch as the decision of which review is sought was rendered by the Seventh Circuit Court of Appeals, not the Indiana Supreme Court.


Review of this Court's decisions demonstrates Petitioner's inability to bring her Petition within subparagraph (c) of Rule 17.1. This Court's decisions show that the questions of federal law presented by the petition have been effectively "settled by this Court" and that the Seventh Circuit in *Pitts* decided such federal questions in a way not "in conflict with applicable decisions of this Court."

This Court has held that due process is not offended when Congress or a State legislature abolishes some unvested common law cause of action by statute. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978); *Silver v. Silver*, 280 U.S. 117, 122 (1929); *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

As was held by the Court of Appeals below, Petitioner's "cause of action had not yet accrued when the Indiana legislature adopted the ten-year statute of limitations contained in the Product Liability Act." (Petition, p. A6).

Thus, the Court of Appeals was clearly correct in holding that such

"an unaccrued cause of action is not a right of property protected by the Fourteenth Amendment. *Silver v. Silver*, 280 U.S. 117, 122; *Munn v. Illinois*, 94 U.S. 113, 134; *Martin v. Pittsburgh & L.E.R. Co.*, 203 U.S. 284, 295; *Ducharme v. Merrill-National Laboratories*,



574 F.2d 1307 (5th Cir. 1978), certiorari denied, 439 U.S. 1002; *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970)." (Petition, p. A6).

The fact that Petitioner had no cause of action when IC 33-1-1.5-5 was enacted, and therefore was not deprived of any property by that statute, is crucial because it makes totally misplaced her reliance on *Wilson v. Iseminger*, 185 U.S. 55 (1902), *Terry v. Anderson*, 95 U.S. 628 (1877), and *Lamb v. Powder River Livestock Co.*, 132 F. 434 (8th Cir. 1904), Petition, p. 6, and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Petition, pp. 5-6).

In *Wilson v. Iseminger*, *supra*, an action in assumpsit for ground rents allegedly due for the years 1887 through 1896 on a deed dated January 4, 1854, was filed in a Pennsylvania State court in Philadelphia in December, 1896. Defendant's defense was based on a Pennsylvania statute which provided that where, as there, no demand had been made by the owner for such rent for over twenty-one years prior to the filing of a suit, a release thereof would be presumed and such rents thereafter would be irrecoverable.

This Court affirmed the trial court's rejection of plaintiff's argument that the statute was unconstitutional because it violated the federal constitutional prohibition against States passing a law impairing obligations of contracts (U.S. Const. Art. I, Sec. 10).

The *Wilson* Court upheld the statute by reasoning that it did not impair the right of contract because it did not destroy the ground rent obligation but instead removed the remedy for breach of that obligation. The Court held that there is no distinction between a claim for ground rent and a claim for any other debt, and because a statute of limitations on the latter was permissible, so was one

on the former. Clearly, neither the facts nor the result in *Wilson* are relevant here.

The *Wilson* Court was concerned with rights vested in the plaintiff under his deed to ground rents, i.e., rights vested by contract or statute, which are sought later to be removed by some statute of limitations:

"But, assuming that there is nothing peculiar in ground rents that withdraw them from the reach of statutes of limitation, it is further contended, in the present case, that the Act of April 27, 1855, can have no valid application to a ground rent reserved before the passage of that statute. It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him ~~to try~~ his rights in the courts. A statute could not bar *the existing rights* of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to *extinguish rights* arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon *existing causes of action*; though what should be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Cooley, Const. Lim. 451.

Thus, in *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365, it was said per Chief Justice Waite:

"This court has often decided that statutes of limitation affecting *existing rights* are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * * " *Wilson v. Iseminger*, *supra*, 185 U.S. 62 63 (citations omitted; emphasis added).

This is not a case like *Wilson v. Iseminger*, *supra*, or *Terry v. Anderson*, *supra*, in which vested rights were being tampered with:

"[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' * * * The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' * * * despite the fact that 'otherwise settled exceptions' may be upset thereby. * * * " *Duke Power Co.*, *supra*, 438 U.S. at 88 n.32 (citations omitted).

Accord, *Silver v. Silver*, *supra*; *Munn v. Illinois*, *supra*.

Lamb v. Powder River Livestock Co., *supra*, Petition, p. 6, is likewise inapposite. The Court was there concerned with a statute of limitations against actions on judgments which was enacted *after* the plaintiff had obtained his judgment against the defendant (which he was seeking to enforce in *Lamb*) and thus *after* his rights in and under that judgment had vested. *Id.*, 132 F. at 435.

Logan v. Zimmerman Brush Co., *supra*, Petition, pp. 5-6, is not in conflict with *Pitts*. There appellant Logan filed a complaint against his former employer Zimmerman Brush Company ("Zimmerman") with the Illinois Fair Employment Practices Commission (the "Commission") for alleged employment discrimination. Logan claimed that Zimmerman wrongfully fired him because of his physical handicap in violation of the Illinois State Fair Employment Practices Act ("FEPA" or the "Act").

Logan had complied with the Act by filing his complaint with the Commission within 180 days of the alleged illegal firing, but the Commission had failed to hold a fact-finding conference as required of it by FEPA within 120 days of the filing of Logan's complaint. When Zimmerman moved to dismiss Logan's complaint with the Com-

mission based on failure to timely hold the conference, the Commission denied Zimmerman's motion.

The Illinois Supreme Court held, in response to a writ filed with it by Zimmerman, that the Commission erred in denying Zimmerman's motion to dismiss because the failure of the Commission to timely hold its conference was jurisdictional. The Illinois Supreme Court then directed the Commission to dismiss Logan's administrative complaint against Zimmerman.

This Court reversed, holding that the Illinois Supreme Court had denied Logan the due process guaranteed him by the Fourteenth Amendment because its decision effectively denied him an opportunity for a hearing appropriate to the nature of his claim for alleged employment discrimination. *Logan, supra*, 102 S.Ct. at 1159.

This Court reasoned that plaintiff Logan's accrued FEPA claim for employment discrimination constituted a property right protected by federal due process. *Logan, supra*, 102 S.Ct. at 1154-56. So holding, the Court went on to hold that the Illinois Supreme Court deprived Logan of that property without a meaningful opportunity to be heard on the merits of his claim. *Logan, supra*, 102 S.Ct. at 156-59.

However, the *Logan* Court noted that a State can choose not to confer or create a property right at all by not granting to a potential plaintiff any cause of action at all. *Logan, supra*, 102 S.Ct. at 1156. Once the State does create a cause of action, it cannot authorize deprivation thereof without appropriate procedural due process safeguards.

However, the State may eliminate a statutory cause of action altogether, in which case the process due is the legislative process in so doing. *Logan, supra*, 102 S.Ct.

at 1156. This is exactly the Seventh Circuit's reasoning in *Pitts*:

"The Indiana Legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute, Ind. Code §34-1-1-2 (1981) remains on the books in case their spouses are ever killed because of someone else's negligence. Such a hope is protected by the voting booth, not by the federal courts. *Munn v. Illinois*, 94 U.S. 113, 134." *Pitts*, *supra*, Petition, p. A6.

What this Court held in *Logan* was that the State cannot deprive a person of his existing property interest in an accrued cause of action by not first giving that person an opportunity to present it. Here, however, as the Seventh Circuit held, plaintiff Janet Pitts did not have any property interest—any cause of action for the alleged wrongful death of her decedent—until Mr. Pitts died on April 4, 1980. Any interest which she would *then* have acquired would have been subject to the ten-year statute of limitations which was enacted effective on June 1, 1978, before she ever acquired her property right, that is, before her cause of action accrued. This clearly does not violate the Fourteenth Amendment: "the State remains free to create substantive defenses or immunities for use in adjudication" *Logan*, *supra*, 102 S.Ct. at 1156.

Thus, *Logan* is not on point. There, as in *Wilson v. Iseminger*, *supra*, the Court was concerned with an attempt by a State—in *Logan*, Illinois acting through its Supreme Court; in *Wilson*, Pennsylvania acting through its legislature—to cut off an existing property interest in an accrued cause of action. Here, in contrast, Petitioner had no existing property interest, because her cause of action had not accrued, when Indiana, acting through its legislature, passed IC 33-1-1.5-5.

This Court went on to hold in *Logan* that there was a deprivation of Logan's FEPA claim "in a random manner" because the State of Illinois had no appreciable interest in the requirement that the Commission hold a fact-finding conference within 120 days of the filing of the Complaint. *Logan, supra*, 102 S.Ct. at 1157.

In contrast, Indiana's interests in having a product liability action filed within ten years of the first sale of the allegedly defective product on which such action is based are substantial under the "legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence." *Pitts, supra*, Petition, p. A9. As the Seventh Circuit properly held, there can be no question that those twin legislative goals are reasonably served by the ten-year limitations period in IC 33-1-1.5-5.

Moreover, this Court in *Logan* reaffirmed its position as stated earlier in *Martinez v. California*, 444 U.S. 217, 282 (1980), "'that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest except perhaps an interest in protecting the individual citizen from State action that is wholly arbitrary or irrational.'" *Logan, supra*, 102 S.Ct. at 1156. There is clearly no wholly arbitrary or irrational state action in IC 33-1-1.5-5.

Comparison of this Court's 1982 *Logan* decision with its 1980 *Martinez* decision demonstrates why *Logan* is not in conflict with *Pitts*.

In *Martinez*, this Court affirmed a California State Court's dismissal, based on the California Tort Claim Act's provision of absolute tort immunity for the State's parole decisions, of a wrongful death claim brought against the State of California by the heirs of a decedent killed by

a parolee based on the alleged negligence of the State's employees in deciding to parole the eventual murderer. The plaintiffs-appellants argued that the California rule violated due process.

This Court in *Martinez* disagreed, upholding the statute because it rationally achieved California's purpose, enhancement of the State's parole program by eliminating any possible "chilling effect" of potential tort liability on the State Agents in the parole decision-making process. This Court so held even though the statute's bar was absolute, and that there was no right to bring any wrongful death, personal injury or property damage claim against the State of California for negligently paroling someone.

The contrast between *Logan* and *Martinez* makes clear why the Seventh Circuit's decision is not in conflict with any of this Court's decisions. In *Logan*, the alleged wrong as to which an absolute bar or immunity was created was for employment discrimination; in *Martinez* it was for personal injury or wrongful death caused by negligence. In *Logan*, the "immunity" was created for an employer who committed such discrimination if no fact-finding conference was held by the Commission within 120 days of the filing of the FEPA complaint. In *Martinez*, the "immunity" was created for the State for its negligence in paroling the actual perpetrator of the injury or death. The Illinois statute was struck down whereas the California statute was upheld.

Examination of this Court's opinions reveals that the different results were compelled because the Illinois statute operated in a random manner, whereas the California statute operated in a rational manner. The Illinois statute was held to operate in a random manner to achieve the apparent Illinois state purpose of forcing the Commission

to quickly develop a complete factual record on the alleged employment discrimination charge before disposing of the charge. In contrast, the California statute was held to operate in a rational manner to achieve the purpose of rehabilitation of criminals by enhancing the parole system.

Thus, under *Martinez*, federal equal protection is not offended by a State statute which creates even an absolute bar to an entire class of potential tort plaintiffs—there the class of persons allegedly injured by a negligently paroled California State prisoner; here, assertedly, the class of persons allegedly injured by products sold over ten years before suit—so long as such a statute rationally achieves a legitimate State purpose. Federal due process is offended by such a statute, under *Logan*, only if the statute operates “in a random manner” and the State interest is “insubstantial”. *Logan, supra*, 102 S.Ct. at 1157.

Here neither test is met: IC 33-1-1.5-5 clearly operates in a rational manner to achieve the substantial Indiana interests in repose and reliance.

The Seventh Circuit was clearly correct in holding (*Pitts*, Petition, pp. A6-A9), that “low level” or rational-basis judicial scrutiny is the proper scope of judicial review of Petitioner’s challenges to the ten-year product liability statute of limitations in IC 33-1-1.5-5 on Federal due process and equal protection grounds. *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, 438 U.S. at 83, 88 n.32; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557, 578 (D.C. Md. 1980) (citations omitted), *aff’d in part, appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981).

Two corollary principles thus applicable to Federal due process and equal protection analysis of IC 33-1-1.5-5 are

that such a "statutory discrimination will not be set aside if *any* set of facts reasonably may be conceived to justify it," *McGowan v. Maryland*, 366 U.S. 420, 421 (1961) (emphasis added), and that the party challenging a classification has a heavy burden "to negative *every* basis which might support it. . . ." *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (emphasis added).

These principles of judicial restraint are particularly appropriate where, as here, a Federal court is asked to review State rules of tort law, such as a statute of limitation, against Federal constitutional provisions because

"the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California, supra*, 444 U.S. at 282.

As to a State statute of limitations, "[t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that *the right to be free of stale claims in time comes to prevail over the right to prosecute them.*" *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) (emphasis added). Such "linedrawing", that is, the determination of *when* that time comes, "is best left to either the [Indiana] legislature or the [Indiana] Supreme Court. * * *" *Neubauer v. Owens-Corning Fibreglas Corp.*, 686 F.2d 570, 574 n.2 (7th Cir. 1982) (citation omitted).

Thus,

"The constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective." *McGowan v. Maryland, supra*, 366 U.S. at 426 n.3 (citations omitted; emphasis supplied).

Petitioner clearly cannot and does not demonstrate any such deficiency in IC 33-1-1.5-5.

One purpose of IC 33-2-2.5-5 and other statutes of limitation is the policy of "reliance," the goal of which is "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. * * *" *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (citation omitted). Evidence as to stale claims is obviously unreliable and prejudicial to the defendant because as the years between injury and suit increase, so does the probability that the search for truth at trial will be impeded and contorted to the benefit of the plaintiff.

The second purpose of a statute of limitation is to effectuate the policy of "repose," which has been described as follows:

"Second, entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time." *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975).

As stated by this Court, the legitimate state goal of "repose" is to protect a citizen from psychological and economic uncertainty: to provide a point in time when a citizen can "be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations." *Chase Securities Corp. v. Donaldson*, *supra*, 325 U.S. at 314.

Indiana's determination that a ten-year statute of limitations achieves Indiana's goals of reliance and repose is clearly rational.

Common experience teaches that it does not take ten years between the first sale of a product and the litigation over its alleged defectiveness for memories of how that product was manufactured to "have faded," or for "witnesses" to its manufacture to "have died or disappeared," or for "evidence" of its production, marketing and delivery to have "been lost." See *Chase Securities Corp.*, *supra*.

It is hardly unreasonable for persons or companies to be granted the right to "plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability" for an allegedly defective product when over ten years have elapsed since the first sale of that product. See *Johnson v. Star Machinery Co.*, 530 P.2d 53, 56 (Ore. 1974).

Even Petitioner could not dispute that a defendant who is required to defend a claim that its allegedly defective product injured them is at a significant disadvantage "by reason of dimmed memories, the death of witnesses and lost documents" when the plaintiff's alleged use of that product occurred over ten years before he filed suit.

As noted above, a key principle of "rational-basis" limited review is that "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, *supra*, 366 U.S. at 421.

More than one set of facts can easily be conceived to justify the selection by the Indiana Legislature of ten years for the limitations period in IC 33-1-1.5-5. The precise length of the limitations period contained in any statute of limitations is, of course, somewhat arbitrary. *Chase Securities Corp.*, *supra*, 325 U.S. at 314-15. In deciding where to draw the line between claims deemed

too old to be fairly entertained, in light of the statute's goal of reliance and repose, and those deemed not too old for those policy goals to be vitiated by their litigation, the legislature must face the difficult task of selecting a reasonable yardstick for drawing this line which achieves the goals sought "in light of the *broad class* of cases to which it applies. . . ." *Hargraves v. Brackett Stripping Machine Co.*, 317 F.Supp. 676, 683 (E.D. Tenn. 1970) (emphasis added).

The broad class of all product liability cases relevant under IC 33-1-1.5-5 includes cases based not only on asbestos-containing products and asbestos, but product cases involving automobiles, airplanes and virtually every other type of "product" imaginable.

The legislative judgment that most of the broad class of product cases which are filed over ten years after the product's first sale are not reliable subjects for litigation is hardly unreasonable.

The legislative determination that people and businesses need to be able to finally and with some reasonable degree of certainty write off contingent liabilities which are over ten years old in order to be able to reasonably plan their economic affairs is hardly capricious.

Petitioner cannot show otherwise. It is practically impossible to make such judgments applicable to "the broad class of cases" involving defective products with any reasonable degree of certainty without being able to resort to extensive and detailed legislative facts, as opposed to adjudicative facts. Recognition of this truth has persuaded this Court to decline to attempt to second guess such a peculiarly legislative judgment. See e.g., *Chase Securities Corp.*, *supra*.


It is this very practical institutional inability or unwillingness of the judicial process—a court's inability to conduct surveys, polls, experiments, public hearings and other factual inquiries directed to the formulation of the rule applicable to the "broad classification", as opposed to hearing specific facts directed to the adjudication of the specific case or cases before it—that mandates affirmation of the Indiana Legislature's evaluation of just such an inquiry by it, where, as here, there is a reasonable basis for the time limit determined from that evaluation.

In short, it is beyond dispute that the ten-year statute of limitations in IC 33-1-1.5-5 achieves the legitimate legislative goals of reliance and repose. IC 33-1-1.5-5 is, therefore, rational and, under the principles of limited judicial review here applicable, must be upheld as constitutional.

Petitioner "[a]ssum[es] . . . that the State interest [behind IC 33-1-1.5-5] is to alleviate manufacturers from liability on machines which have caused injury after their useful life" (Petition, p. 7). Petitioner's assumption of such a legislative purpose for IC 33-1-1.5-5 is not supported by either the statute itself or the record.

The purpose of IC 33-1-1.5-5 is clear from the statute's terms: it has nothing to do with the "useful life" of a product, a phrase not used in the statute, but rather is to bar as untimely "any product liability action" not "commenced" "within ten (10) years after the delivery of the product to the initial user or consumer" IC 33-1-1.5-5. As discussed above, there can be little question that such a statute rationally achieves the policies of reliance and repose.

Petitioner asserts that IC 33-1-1.5-5 creates two "sub-classes of tort plaintiffs based upon . . . whether the




instrumentality causing injury in a products liability suit was first sold more than ten years from the date the cause of action accrued." (Petition, p. 7). Petitioner fails to show how this asserted "classification" violates equal protection.

Petitioner's argument that IC 33-1-1.5-5 creates two impermissible classes of plaintiffs was effectively refuted in *Dague v. Piper Aircraft Corp.*, 513 F.Supp. 19, 24-25 (N.D. Ind. 1980), *aff'd*, Case No. 79 C 293 (7th Cir. 1981). Plaintiff Dague had argued, as does Petitioner here, that IC 33-1-1.5-5 improperly established an unreasonable classification between consumers injured by older products and those injured by newer products. The District Court rejected Dague's argument, holding that the ten year cut-off time is not "arbitrary or unreasonable" and "to the extent that . . . consumers of older products are unprotected, such classification [is] reasonable and rational." *Id.*

Petitioner's argument (Petition, p. 7) also implies a contention that the Indiana Legislature drew the line which separates the class of product liability claims which can be litigated from the class too stale for litigation along a yardstick of the average useful life of products which could injure the users thereof so as to give rise to such suits. Petitioner unsuccessfully so argued in the Seventh Circuit. Petitioner argues that the Legislature's determination that most such products would not be in use over ten years after their first sale is unreasonable.

In the first place, as previously discussed, Petitioner cannot show that "useful life" was in fact the Legislature's yardstick. IC 33-1-1.5-5's literal measure is the length of time between first delivery of the product and litigation over that product's alleged defectiveness, a means of classification clearly related to the ends of reliance and repose.



Moreover, even if "useful life" was the Legislature's rationale, Petitioner cannot show that rationale to be unreasonable in this forum. No doubt there are some, perhaps many, products which can be and are used for longer than ten years; conversely, there are undoubtedly some, perhaps many, products destined for the junkyard long before ten years of use, thus minimizing, if not eliminating, any risk of injury to the consumer before the ten years has passed. Such decisions are clearly ones for the Legislature, based on "legislative facts". Petitioner cannot show that it is irrational for the Indiana Legislature to decide that most of the "broad class" of products are not in use after ten years.

This Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, *supra*, supports the denial of review. There environmentalists sought to overturn a \$560 million federal statutory ceiling on the damages for which a utility could be liable to one damaged in a nuclear accident. Applying the low-level judicial scrutiny here appropriate, this Court upheld the statute as not inconsistent with federal equal protection and due process. *Id.*, 438 U.S. at 83.

The *Duke Power* Court held that the purpose of the liability ceiling, "to encourage . . . the involvement of private enterprise in the production of electrical energy through the use of atomic power" by reducing the inhibitory effect of unlimited tort liability for nuclear accidents, was a legitimate purpose rationally served by a statutory liability limitation. *Ibid.*, 438 U.S. at 84.

As to the rationality of the \$560 million per occurrence figure chosen by Congress as the appropriate liability limitation, the Court observed that "whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that

any choice of a figure based on imponderables like those at issue here can always be so characterized." *Ibid.*, 438 U.S. at 86. The "imponderables" considered by Congress were "expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of \$560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice." *Id.*, 438 U.S. at 85. Given the somewhat speculative nature of such "imponderables", the Court held that whatever arbitrariness characterized the particular number finally chosen "is not . . . the kind of arbitrariness which flaws otherwise constitutional action." *Ibid.*, 438 U.S. at 86.

Similarly, given the imponderables of when an action becomes too old or stale to be reliably litigated, or when a contingent liability becomes so remote as to justify extinguishing it in the interests of certainty in economic planning, the Indiana legislature's choice of ten years as the length of time from the first delivery of a product within which an action based on its defectiveness must be brought under IC 33-1-1.5-5 does not demonstrate the kind of arbitrariness which flaws otherwise constitutional action. This is so because, similar to the amount of the liability ceiling at issue in *Duke Power*, the length of the statutory limitations period here at issue rationally achieves the legitimate legislative purposes of repose and reliance.

Two recent summary dismissals of appeals in asbestos cases demonstrate that review should be denied. In *Bunker v. National Gypsum Co.*, Docket No. 82-1243, U.S., 103 S.Ct. 1761 (April 18, 1983), the Court held that

"The appeal is dismissed for want of a substantial federal question." *Ibid.*, 103 S.Ct. at 1762.

In *Bunker, supra*, plaintiff-appellant Richard D. Bunker appealed from the Indiana Supreme Court's decision in *Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), which reversed an earlier decision of the Indiana Court of Appeals, *Bunker v. National Gypsum Co.*, 426 N.E.2d 422 (Ind. App. 1981), which held that Ind. Code §22-3-7-9(e) (Burns 1974) violated the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. That statute of limitations provided, in part, that no compensation under the Indiana Workmen's Occupational Diseases Act would be paid for occupational diseases allegedly caused by the inhalation of asbestos dust unless the claim was filed "within three [3] years after the last day of the last exposure to" the asbestos. IC 22-3-7-9(e).

The Indiana Supreme Court held that

"We now find the statute of limitations provision of the Occupational Diseases Act to be constitutional in all respects." *Bunker v. National Gypsum Co., supra*, 441 N.E.2d at 14.

The Court will recall that appellant Bunker challenged the Indiana Supreme Court's decision on both federal due process and equal protection grounds, as Petitioner has here challenged IC §33-1-1.5-5.

Clearly, the thrust of appellant Bunker's due process and equal protection challenges to IC 22-3-7-9(e) is identical to that of petitioner Pitts' due process and equal protection challenges to IC 33-1-1.5-5. Both contend that because "there is a prolonged period between initial exposure to asbestos and the development of any disease processes which are discoverable by an individual," (Petition, p. 4),

and because such "prolonged period" assertedly varies "from ten to thirty years", (Petition, p. 3), the applicable limitations period [in IC 33-1-1.5-5, ten years; in IC 22-3-7-9(e), three years] violates federal due process because such a statute of limitations terminates "a plaintiff's right to assert a cause of action . . . at a time before which the plaintiff could not reasonably have known of the existence of that cause of action" and violates equal protection because it "absolutely bars petitioner and others similarly situated from asserting a cause of action" (Petition, p. 1: "Questions Presented").

This Court rejected those contentions by its dismissal of the appeal in *Bunker*. The Court held that an appeal stating just such arguments failed to present a substantial federal question. Such a summary dismissal by this Court is a ruling on the merits in that it rejects the specific challenges to the *Bunker* decision presented by appellant Bunker in his statement of jurisdiction and leaves undisturbed the judgment of the Indiana Supreme Court. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808, 809 (7th Cir. 1979), *cert. denied*, 444 U.S. 911; *Ahern v. Murphy*, 457 F.2d 363, 364-65 (7th Cir. 1972) (equal protection challenge to Chicago ordinance dismissed based on this Court's dismissal of appeal from Michigan Supreme Court, which had upheld a similar Detroit ordinance against an equal protection challenge).

Bunker is not the only decision of this Court on point. Essentially the same federal due process challenge as Petitioner here makes to IC 33-1-1.5-5 and as appellant Bunker made to IC 22-3-7-9(e) was made by the appellants in *Rosenberg v. Johns-Manville Sales Corp.* and *Steinhardt v. Johns-Manville Corp.*, Supreme Court Docket

Nos. 81-1614 and 81-1615, *Rosenberg v. Johns-Manville Sales Corp.*, U.S., 102 S.Ct. 2226, 73 L.Ed.2d (1982), and *Steinhardt v. Johns-Manville Corp.*, U.S., 102 S.Ct. 2226, 73 L.Ed.2d (1982).

There the New York Court of Appeals had affirmed summary judgments granted the defendant asbestos manufacturers based on the New York statute of limitations which, under pre-existing New York case law there reaffirmed, was held to commence to run on the date of the last exposure. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (Ct. App. 1981).

While true that this Court “[t]reated the papers whereon the appeals were taken as petitions for writ of certiorari”, and then “denied” “certiorari”, *Rosenberg, supra*, 102 S.Ct. at 2226; *Steinhardt, supra*, 102 S.Ct. at 2227, rather than dismissing the appeal “for want of a substantial federal question” as it did in *Bunker, supra*, the effect is, of course, the same. Each decision of this Court left intact the decision of a State court of last resort which held that the summary dismissal of a claim for compensation for an alleged asbestos-related disease did not violate the Fourteenth Amendment. Such dismissals occurred because the claims were filed after expiration of the applicable State limitations period, even though each such limitations period was, by Petitioner’s argument, shorter than the “prolonged period between initial exposure to asbestos and the development of any disease processes which are discoverable by an individual.” (Petition, p. 4).

Thus, the clear import of this Court’s dismissals of the appeals in *Bunker, supra*, 103 S.Ct. at 1761-62, and in *Rosenberg* and *Steinhardt, supra*, 102 S.Ct. at 2226-27,

is that certiorari should be here denied because the Seventh Circuit's decision in *Pitts* did not decide a federal question in a way in conflict with applicable decisions of this Court.

Petitioner's only cases not already distinguished, *United States v. Kubrick*, 444 U.S. 111 (1979) (Petition, pp. 5-6), and *United States v. Morena*, 245 U.S. 392 (1918) (Petition, p. 6), are not to the contrary. *Kubrick* involved this Court's determination as to when a federal statute of limitations, the one provided in the Federal Tort Claims Act, began to run on a federally created cause of action. *Kubrick* was thus concerned with a question of federal statutory construction. It did not involve a test of a State statute of limitations against Federal constitutional guarantees of due process and equal protection.

Kubrick does not, therefore, contradict the clear implication of this Court's dismissal of the appeals in *Bunker* and *Steinhardt*, that is, that

"Nor is a discovery rule mandated apparently by various provisions of the Federal Constitution. See *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.1d 1008, 446 NYS 2d 244, 430 N.E.2d 1297 (Ct. App. 1981), certiorari denied, U.S., 102 S.Ct. 2226, 73 L. Ed.2d" *Neubauer v. Owens-Corning Fibreglas Corp.*, *supra*, 686 F.2d at 575 n. 4.

United States v. Morena, 245 U.S. 392 (1918) (Petition, p. 6), is even less pertinent than *Kubrick*. Not only was this Court there concerned only with a question of federal statutory construction, *Id.*, 245 U.S. at 393, but the federal statute at issue was not even a statute of limitations. *Ibid.*

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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